SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 70-154

JOHNNIE PRUETT,

Petitioner

v.

THE STATE OF TEXAS, and
J. F. CLAWSON, JR.,

Respondents

PETITIONER'S PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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FIRM FOUNDATION—AUSTIN

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes the Petitioner, Johnnie Pruett, and files this Petition for Rehearing, and respectfully moves for an order (1) vacating its denial of the Petition for Writ of Certiorari, entered on October 26, 1971,

and (2) granting the petition, or (3) stating reasons for denial. As grounds for this Motion, Petitioner states the following:

1. The Statutory Scheme Which Discriminates Against Felons Who Can Not Make Bond and Who Appeal Their Cases.

Reasonable minds can never differ on the proposition that a felon who is unable to make bond will be chilled and deterred against using his right of appeal, if he knows that during such appeal he can not get good time credit, especially when the statutes, as in Texas, automatically give him credit for 20 days out of every 30 if he enters the pen.

Such credit is not a reward for *good* conduct; it is an automatic part of his sentence, unless he has charges sustained against him for *bad* conduct. There is no status to *achieve*, looking toward rehabilitation, as suggested by the Respondent State of Texas. He has an automatic status which qualfies him under both Texas law and practice. Unless he is guilty of *misconduct*, and proved to be so guilty, he is entitled to the credit. Article 6184 *1* Texas Revised Civil Statutes. Upon entry into the Penitentiary he is automatically classified as a "Class 1" prisoner, and entitled to credit of *20 extra days per month*. Rules and Regulations of the Texas Department of Corrections, page 4, 3rd paragraph, copied in Appendix A, page 10.

Reasonable minds can not differ on the proposition that Petitioner, unable to make bond, who served 23 months in a county jail on a 24 month sentence, and

others of the class he represents, are denied equal protection of the law, because they took an appeal, when appeals always take many, many months, and the foregoing of an appeal would automatically mean that a 24 months sentence in the Penitentiary would be completed in 14½ months. In other words, by appealing unsuccessfully he is penalized by 9½ months confinement!

2. **The conflict required by Rule 19, 1 (a) is sharp and direct, because Texas is already committed to following footnote 13 in North Carolina v. Pearce, 395 U. S. 711, requiring recognition of good conduct credits.**

The "status" argument of the State falls before the case of *Smotherman v. State* (Ct. Crim. App. Tex. 1970), 455 S. W. (2) 285, 287. In that case the Court of Criminal Appeals expressly followed footnote 13 in *North Carolina v. Pearce,* 395 U. S. 711, 719. It specifically held that on resentencing a felon must be given credit for good conduct.

3. **The Unique and Intervening Circumstance That the Issues Here are also Before the Court of Appeals for the 5th Circuit Makes it Important that the Supreme Court State Its Reasons for Denying Certiorari, if it does not grant Rehearing, Or that It State that the Court of Appeals Should Pass on the Case Without Being Influenced by the Denial of the Writ.**

We are respectfully mindful of the doctrine that

denial of a Petition for Writ of Certiorari should not be taken as an indication by the Court of its Opinion on the merits. But an intervening circumstance, we believe, deserves the attention of the Court in this connection. Respondent, the State of Texas has perfected its appeal from the judgment of Judge Suttle (Western District of Texas) which released Petitioner on his Petition for Writ of Habeas Corpus. That appeal now pends before the Fifth Circuit.

Therefore, this present instance "is peculiarly one where the redundant becomes the necessary." Mr. Justice Frankfurter in *Maryland v. Baltimore*, 338 U. S. 912, 917-20. "It becomes necessary to say that denial of this petition carries no support whatever for concluding that either the majority or the dissent in the court below correctly interpreted the scope of our decisions * * *."

The record in this case affirmatively reflects that the Supreme Court has considered the merits of Petitioner's complaint. Mr. Justice Stewart voted for a stay well before Petitioner was reincarcerated. The whole Court twice refused a stay. Yet while the Petitioner's application for habeas relief was pending before Judge Suttle in the Western District at San Antonio, some of the Justices asked the Clerk to obtain the status of Petitioner's application for habeas relief. Furthermore, on August 24, 1971, the Court directed the Clerk to request of Respondent Texas that it file a response, and that such response should not be limited to but should specifically be addressed to "the constitutionality of denying eligibilty for good time credit to those in county jail awaiting appeal when

the state allows misdemeanants in county jail and felons in the penitentiary to be eligible for good time credit."

In view of this circumstance, the State will surely argue before the Court of Appeals as Mr. Justice Jackson said:

> "The Court is not quite of one mind on the subject. Some say denial means nothing, others say it means nothing much. Realistically, the first position is untenable and the second is unintelligible. How can we say that the prisoner must present his case to us and at the same time say that what we do with it means nothing to anybody . . ." (344 U. S. 542-543)

The doubtful muddle which a denial of certiorari sometimes causes was noted by Mr. Justice Black in *Simmons v. Union News Co.*, 382 U. S. 884, 886; and the authorities are collected by Stern & Gressman in *Supreme Court Practice*, Fourth Edition, Page 213 et seq.

Surely Petitioner is entitled to go before the Court of Appeals for the 5th Circuit without being there hampered by the doubts which assailed the 7th Circuit in *Kraft Foods v. Commodity Credit Corp.*, 266 F. (2) 254, 263, cer. denied 361 U. S. 832, when it said "* * * the lack of at least four for granting certiorari cannot realistically be considered meaningless * * *"

The Court has already labored so over this case that it would seem proper for it to indicate its tentative

views to the Fifth Circuit. That latter Court now has before it the tremendous burden of searching a voluminous record. It, like the Supreme Court, is overburdened with the flood of litigation.

CONCLUSION

For the reasons set forth, as well as those contained in the petition for writ of certiorari, Petitioner prays that this Court grant a rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below, or in the alternative indicate its views by memorandum opinion at this time showing why certiorari is denied.

Respectfully submitted

DAVID L. TISINGER
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Austin, Texas 78701
Attorney for Petitioner

CERTIFICATE OF COUNSEL

As counsel for Petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2).

Counsel for Petitioner

APPENDIX A

STATE OF TEXAS

RULES AND REGULATIONS

of the

TEXAS DEPARTMENT OF CORRERCTIONS

Adopted by Board

July 13, 1953

Revised January 1, 1968

GEORGE J. BETO, Ph.D.
Director of Corrections

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PREFACE

This booklet is designed to give you a working knowledge of the policies, rules, and regulations under which the Texas Department of Corrections operates. It is impossible to cover every situation that may develop. You will consult the officer in charge concerning anything you do not understand.

It is not the fault of the officials of the Texas Department of Corrections that you are here. You were committed to their care in accordance with the laws of the State. We want to help you improve your position in life. If your attitude is good, you can learn some skill and improve your knowledge to the extent that you can live in harmony with your fellowman when released.

All improvement in the human race comes from:

(1) THE ABILITY TO THINK AND REASON.

(2) CHARACTER DEVELOPMENT.

(3) AMBITION.

You must put forth your best energies to acquire and improve these qualities within yourself. It is our wish that when you leave this institution you will go back into the free world and make a place for yourself, live an honorable life, and develop into a citizen who will bring credit to his community and his State.

H. H. COFFIELD

Texas Board of Corrections

INTRODUCTION

Whenever two or more men live together, rules and regulations are necessary for governing their lives. Whenever a social group is without rules, anarchy prevails.

The rules and regulations in this booklet are designed primarily for the benefit of the inmates under the care of the Texas Department of Corrections. While they allow a relaxed prison atmosphere, they serve to discipline the inmate, protect his safety as well as that of his fellows, contribute to the achievement of the objectives of the industrial and agricultural program of the Department of Corrections, and aid in a program of rehabilitation.

A disregard for these rules will result in a prolonged stay in the Texas Department of Corrections, less desirable work assignments, and punishment. Their observance, conversely, will aid the inmate in receiving parole or early discharge, a choice work assignment and a considerable number of privileges which lighten the essential burden of prison life.

The choce to observe or to disregard these rules lies with the individual inmate.

GEORGE J. BETO, Ph.D.
Director

COMMUTATION OR OVERTIME

The commutation or "good time" law, as provided by Article 6184L of the Revised Civil Statutes of Texas, sets forth the standards of overtime or good time for inmates in the Texas Department of Corrections. The Texas law is liberal and grants more commutation time than do most other states or the Federal Bureau of Prisons.

Under the Texas commutation law there are three classes of commutation time or "good time." These good-time or time-earning categories are referred to as Class I, Class II, and Class III.

CLASS I provides that each inmate in this time-earning class will receive a total of twenty extra days time for each month served on his sentence, so long as that inmate maintains a clear conduct and work record. *Whenever any inmate is received in the Texas Department of Corrections, he is immediately placed in Class I.*

CLASS II provides that any inmate in this class or category will receive a total of ten extra days time for each month served. This class is set aside for those inmates who have been found in violation of certain rules and regulations of the Texas Department of Corrections. The State Disciplinary Committee is the governing authority for placing an inmate in this classification.